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# IN THE COURT OF APPEALS OF INDIANA

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| JOETTA ALLEN, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 02A05-0601-CR-41 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Kenneth R. Scheibenberger, Judge
Cause No. 02D04-0507-FD-441

**September 19, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

## STATEMENT OF THE CASE

Joetta Allen ("Allen") appeals from her conviction for possession of cocaine as a class D felony, after a bench trial.

We affirm.

## ISSUES

1. Whether the warrantless strip search by authorities was an unreasonable search and seizure in violation of the Fourth Amendment of the United States Constitution and Article 1, Section 11 of the Indiana Constitution.

2. Whether the photographs of seized cocaine were erroneously admitted due to an alleged breakdown in the chain of custody.

## FACTS

Prior to July 4, 2005, Allen was placed on the Allen County Community Corrections Electronic Surveillance program ("home detention") following a conviction for forgery. As part of the home detention agreement, Allen consented to any warrantless search of her residence and vehicle by signing a waiver form. Section B of the agreement specifically provides as follows:

> You shall and hereby do, consent to the seizure of contraband, evidence of a crime . . . that may be found on such search. By these consents, you understand and acknowledge that you are waiving your rights under the Fourth Amendment of the United States Constitution and Article I, Section II of the Indiana Constitution against unreasonable searches and seizures.

(State's Ex. 1). Moreover, Allen's boyfriend, Grady Perry ("Perry"), and Allen's sons, Contrell Allen and Cameron Allen, also signed the waiver due to the home detention program requiring all persons over the age of eighteen, residing therein, to consent to a search of the residence.

On July 4, 2005, Allen received permission from the home detention program to leave her residence to fill a prescription at a local pharmacy. Officer Doug Schwertfager "was notified of this from [the program's] communications room." (Tr. 10). He "decided to perform surveillance on [Allen] to insure that she did go to the [pharmacy]." Id. Officer Schwertfager followed Allen, but lost her in traffic. When he finally arrived at the pharmacy, he found that it was closed. Officer Schwertfager proceeded to Allen's residence and was then permitted to enter her residence by Perry.

As Officer Schwertfager entered Allen's bedroom, he observed her "put[ting] something underneath a cushion" of the couch where she was sitting and she "seemed very nervous, trying to maybe overcompensate for something." (Tr. 11, 12). On pervious occasions when Officer Schwertfager had made home visits with Allen, she had been "calm, . . . more relaxed, [and did] not talk[] as much." (Tr. 12). "Based on [Allen's] behavior, [Officer Schwertfager] . . . looked underneath the couch . . . and found a spoon" which later tested negative for any controlled substance. Id. He then searched the residence and found no contraband. However, Officer Schwertfager still remained suspicious of Allen's unusual behavior and "called for officer assistance to do a pat search." (Tr. 18, 19).

At approximately 9 p.m., Officer Angela Reed, a female officer of the Fort Wayne Police Department arrived and performed a "pat-down" search of Allen's outer clothing and found nothing incriminating. (Tr. 29). Officer Reed then asked Allen to unfasten her bra, which she complied. Officer Reed then "took hold of [Allen's] shirt and bra and shook them." (Tr. 44). Officer Reed "checked [Allen's] pajama pockets[]," asked her to

pull down her pajama bottoms and "shake them out." (Tr. 30, 44). Allen removed her pajama bottoms and shook out her underwear. As Allen shook out her underwear, "an off-white, rock-type substance hit the floor." (Tr. 30). Officer Reed had not seen "any white substance on the floor before [the search]." Id. Allen was asked to move forward by Officer Reed; instead of complying, Allen "stepped on the substance," "cover[ing] it[] . . . with her foot." (Tr. 39). Officer Reed then secured the evidence, "field tested it[,] and then gave it to Officer Schwertfager." (Tr. 41). Allen was placed under arrest and taken into custody.

On July 11, 2005, the State charged Allen with possession of cocaine as a class D felony. A bench trial was held on October 19, 2005. At trial, Allen stipulated to a certified copy of the Indiana State Police laboratory report that the substance seized tested was 0.01 grams of cocaine. The trial court found Allen guilty as charged.

## DECISION

### 1. Reasonableness of Warrantless Strip Search

Allen argues that the search of her person was an unreasonable search and seizure pursuant to the Fourth Amendment of the United States Constitution and the Article 1 § 11 of the Indiana Constitution. Specifically, Allen claims that although she had signed the home detention agreement requiring her to consent to being searched at any time, such waiver did not entirely extinguish all of her protections under the state and federal constitutions.

The Fourth Amendment of the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,

> and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Congruently, the Indiana State Constitution also provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

Ind. Const. Art. 1, § 11. In searches without a warrant, the State bears the burden to prove that an exception to the warrant requirement at the time of the search. White v. State, 772 N.E.2d 408 (Ind. 2002) (citing Hollowell v. State, 753 N.E.2d 612, 615 (Ind. 2001)). "[T]here are exceptions to the warrant requirement." Myers v. State, 839 N.E.2d 1146, 1150 (Ind. 2005) (citing Black v. State, 810 N.E.2d 713, 715 (Ind. 2004)). For instance, the State's operation of a community correction system, as with any other type of probation, presents "special needs" beyond the normal need for law enforcement that justifies such a departure from the usual warrant and probable cause requirements. Bonner v. State, 776 N.E.2d 1244, 1248 (Ind. Ct. App. 2002) (citing Rivera v. State, 667 N.E.2d 764, 766 (Ind. Ct. App. 1996), trans. denied (1996)).

A home detention program is a type of probation, and such an imposition is a criminal sanction. See Purdy v. State, 708 N.E.2d 20, 22 (Ind. Ct. App. 1999). Further:

> Probation is a conditional liberty dependent upon the observance of certain restrictions. As such, probationers simply do not enjoy the freedoms to which ordinary citizens are entitled. Certain restrictions on a probationer's behavior are designed to assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by a probationer being at large. These goals require and justify the exercise of supervision to ensure that the restrictions are in fact observed by the probationers.

Id. Although probationers have limited liberty expectations, they are still entitled to some limited protection, such as the requirement that a search under the Fourth Amendment and Article 1, Section 11, must be reasonable. Allen v. State, 743 N.E.2d 1222, 1227 (Ind. Ct. App. 2001).

As a condition of probation, a probationer may have to submit to searches; however, the search "cannot be mere subterfuge enabling the police to avoid obtaining a search warrant." Id. A "probationary search" is a search that must advance "the goals of probation that allow the probationer to 'demonstrate his rehabilitation while serving a part of his sentence outside the prison walls.'" Purdy, 708 N.E.2d at 22 (quoting Latta v. Fitzharris, 521 F.2d 246, 249 (9th Cir. 1975)). The State has the burden of proving that the warrantless search of Allen was a "true parole/probation search." Allen, 743 N.E.2d at 1228. If the search is determined not to be a true parole/probation search, then privacy rights enjoyed by regular citizens would apply to Allen, as well. Id. Therefore,

> courts must conduct a bifurcated inquiry. First, a court should determine whether the search was indeed a parole or probation search. If the search was not conducted within the regulatory scheme of parole/probation enforcement, then it will be subject to the usual requirement that a warrant supported by probable cause be obtained. If the search is a true parole/probation search, then a court must determine whether he search was reasonable.

Id.

Here, Allen, was sentenced to community corrections and ordered confined to her home at all times except for approved specified activities. On July 4, 2005, Allen obtained permission to leave the confinement of her home to get a prescription filled. Officer Schwertfager, Allen's community corrections officer decided to perform

surveillance of Allen to determine whether she was compliant with community corrections approval for her to go to the pharmacy. Officer Schwertfager lost Allen in traffic but proceeded to the pharmacy, and discovered it was closed. He did not see Allen at the pharmacy and immediately drove to Allen's residence to check on her whereabouts. Upon his arrival, Allen appeared "very nervous" and exhibited behavior not detected in past visits. Officer Schwertfager also saw Allen attempt to hide a spoon under the cushion where she was seated which further aroused his suspicions. After retrieving the spoon, he searched the residence and discovered no contraband. However, Allen's nervous behavior remained unabated. He called for a female officer to assist in performing a body search of Allen's person, which uncovered cocaine.

In this case, we find the search to have been a true probation search. It is clear from the facts, that the officer's motivation to conduct surveillance of Allen was to determine if she used the limited permission granted to her to leave the confinement of her house for the stated purpose. Further, once inside Allen's residence, her "very nervous" behavior and attempt to hide a spoon, gave rise to suspicion that narcotics activity might be afoot. Upon our finding that the search was a true probation search, we must next determine if the search was reasonable under both the Fourth Amendment of the United States Constitution and Article 1, Section 11 of the Indiana Constitution.

We have previously held that a warrantless search of a probationer's home based upon suspicion of criminal activity being afoot is reasonable within the meaning of the Fourth Amendment. Bonner v. State, 776 N.E.2d at 1248. Allen concedes the reasonableness of the search of her residence and the limited pat-down search of her outer

clothing, but, she objects to what she characterizes as a strip search that resulted in the discovery of the crack cocaine.

The United States Supreme Court has analyzed claims of intrusive body searches under the Fourth Amendment. See Winston v. Lee, 470 U.S. 753 (1985). The reasonableness of such a search is a threshold determination to be made in ascertaining the legality of a body search. Id. Whether the right to be free from unreasonable searches has been violated under the Fourth Amendment depends upon the facts and circumstances of each individual case. Frye v. State, 757 N.E.2d 684, 690 (Ind. Ct. App. 2001).

We must not overlook the fact that Allen was on conditional home release and submitted herself to compromised liberties in order to avoid the restriction of incarceration in prison. Allen's attempt to hide a spoon from the officer and her unusual nervousness provided reasonable suspicion for the officer to believe that criminal activity might be afoot, which would lend support of a search of Allen's person. Focusing upon the facts of the strip search, Officer Reed testified she patted down Allen in the privacy of her bedroom. The removal of Allen's clothing occurred outside of the presence of the male officer and was not unusual under the facts and circumstances of the case. We find that the search was not unreasonable, and the trial court did not err in admitting the evidence of the crack cocaine found on Allen's person.

Next, the legality of a governmental search under the Indiana Constitution turns on an evaluation of the reasonableness of the police conduct under the totality of the circumstances. Frye v. State, 757 N.E.2d at 690 (citing Moran v. State, 644 N.E.2d 536,

539 (Ind.1994)). We have explained that the reasonableness of a search or seizure turns on a balancing of: 1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs. Id.

Here, Allen's liberty was conditional and less restricted than her being placed in prison, and designed to enable true rehabilitation to occur. The search of Allen's residence was conducted pursuant to her agreed conditions of being placed on home detention. Moreover, Officer Schwertfager personally observed Allen acting very nervously and attempting to hide a spoon from him. Allen's nervous behavior continued although a search of her residence revealed no contraband. Officer Schwertfager requested that a physical search of Allen be performed by Officer Reed in the privacy of Allen's bedroom. Based upon the totality of the circumstances, we find that the search of Allen's person to be reasonable under Article 1, Section 11 of the Indiana Constitution.

2. Chain of Custody

Allen asserts that the trial court erred when it admitted evidence regarding the crack cocaine which was seized because "[t]he record is utterly devoid of any introduction of this substance into evidence, any explanation as to precisely where the minuscule quantity of the substance was from July 2, 2005, until trial on November 18, 2005." Allen's Br. 8.

In order to establish a chain of custody, "the State must give reasonable assurances that the evidence remained in an undisturbed condition." Troxell v. State, 778 N.E.2d 811, 814 (Ind. 2002) (internal citations omitted). "However, the State need not establish

a perfect chain of custody, and once the State 'strongly suggests' the exact whereabouts of the evidence, any gaps go to the weight of the evidence and not to admissibility." Id. "Moreover, there is a presumption of regularity in the handling of evidence by officers, and there is a presumption that officers exercise due care in handling their duties." Id. "To mount a successful challenge to the chain of custody, one must present evidence that does more than raise a mere possibility that the evidence may have been tampered with." Id. The "State bears a higher burden to establish the chain of custody of 'fungible' evidence, such as blood and hair samples, whose appearance is indistinguishable to the naked eye." Id.; see Hough v. State, 560 N.E.2d 511, 517 (Ind. 1990) (identifying narcotics as fungible).

In the instant case, both Officers Schwertfager and Reed testified that Officer Reed gave him the rock-like substance that she had obtained after the physical search of Allen. Officer Schwertfager took the rock-like substance to the Allen County Jail and placed it in the narcotics mailbox.

At trial, photographs of the rock-like substance were admitted into evidence. Additionally, Allen stipulated to State's exhibit 5, which is a Certificate of Analysis from the State Police Laboratory, which reported to have tested "an off-white rock-like substance" and found it to contain cocaine base. State's Ex. 5. The report had the same case number as the photograph exhibits admitted at trial.

While we do find that there is an evidentiary gap in the chain of custody, Allen's challenge does not overcome the presumption of regularity in the handling of the evidence by officers and the presumption that officers exercised due care in handling

their duties. See Troxell, 778 N.E.2d at 814. The gap in custody goes to the weight to be given the evidence in this case and not its admissibility. Id. Therefore, we find that the trial court did not abuse its discretion when it found the evidence collected from Allen's residence was the item tested in State's exhibit 5.

We affirm.

RILEY, J., and VAIDIK, J., concur.